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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77- 1624

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE,

*Petitioner,*

*v.*

SEACOAST ANTI-POLLUTION LEAGUE and AUDUBON SOCIETY OF NEW HAMPSHIRE,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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## TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF CITATIONS | ii |
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| QUESTIONS PRESENTED FOR REVIEW | 2 |
| STATUTES AND REGULATIONS INVOLVED | 3 |
| STATEMENT OF THE CASE | 3 |
| Introduction | 3 |
| I. The Statutory Framework | 4 |
| II. Agency Proceedings with Respect to Petitioner's Nuclear Power Plant | 4 |
| REASONS FOR GRANTING THE WRIT | 7 |
| I. The Decision of the Court of Appeals Imposes upon Federal Agencies Procedural Obligations not Required by the Congress and is in Conflict with this Court's Decisions as to the Scope of Judicial Review | 7 |
| II. To the Extent it Construes the APA, the Decision Will Result in the Imposition of Formalistic Trial-Type Procedures on Numerous Administrative Proceedings Heretofore Unburdened by Such | 9 |
| III. By Disregarding the EPA Administrator's Statement as to the Actions Taken by his Technical Panel the Court of Appeals has so far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of this Court's Power of Supervision | 13 |
| CONCLUSION | 17 |

# TABLE OF CITATIONS

## Cases


| | Page(s) |
|---|---|
| *Camp* v. *Pitts*, 411 U.S. 138 (1973) | 12 |
| *EPA* v. *State Water Resources Control Board*, 426 U.S. 200 (1976) | 4 |
| *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940) | 9 |
| *FCC* v. *Schreiber*, 381 U.S. 279 (1965) | 9 |
| *ITT* v. *Electrical Workers*, 419 U.S. 428 (1975) | 12 |
| *Marathon Oil Company* v. *EPA*, 564 F.2d 1253 (9th Cir. 1977) | 8 |
| *Morissette* v. *United States*, 342 U.S. 246 (1952) | 11 |
| *Public Service Company of New Hampshire* (Seabrook Station, Units 1 & 2), LBP-76-26, 3 NRC 123 (1976), *aff'd*, ALAB-422, 6 NRC 33 (July 26, 1977), *aff'd*, CLI-78-1, 7 NRC — (January 6, 1978) | 5 |
| *United States Steel Corp.* v. *Train*, 556 F.2d 822 (7th Cir. 1977) | 8 |
| *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972) | 11 |
| *United States* v. *Florida East Coast Ry.*, 410 U.S. 224 (1973) | 10, 11 |
| *United States* v. *Turley*, 352 U.S. 407 (1957) | 11 |
| *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, — U.S. —, 46 U.S.L.W. 4301 (April 3, 1978) | 8, 9, 16, 17, 18 |
| *Wong Yang Sung* v. *McGrath*, 339 U.S. 33 (1950) | 9 |




## Statutes


| | Page(s) |
|---|---|
| Administrative Procedure Act, 5 U.S.C. § 501 *et seq.* | 3, 12 |
| § 4, 5 U.S.C. § 553 | 3, 10, 11 |
| § 4(c), 5 U.S.C. § 553(c) | 10 |
| § 5, 5 U.S.C. § 554 | 2, 3, 7, 8, 11, 12 |
| § 5(a), 5 U.S.C. § 554(a) | 11 |
| § 7, 5 U.S.C. § 556 | 2, 3, 7, 8, 10, 11, 13 |
| § 8, 5 U.S.C. § 557 | 2, 3, 7, 8, 10, 11 |
| § 9(c), 5 U.S.C. § 558(c) | 8 |
| Federal Water Pollution Control Act, Amendments of 1972, 33 U.S.C., 1251 *et seq.* | 3, 4, 10, 12 |
| § 307(a)(2), 33 U.S.C. § 1317(a)(2) | 11 |
| § 316, 33 U.S.C. § 1326 | 3, 7, 10, 11, 13 |
| § 316(a), 33 U.S.C. § 1326(a) | 4, 5, 11 |
| § 402, 33 U.S.C. § 1342 | 3, 4, 5, 7, 11, 13 |
| § 402(a)(1), 33 U.S.C. § 1342(a)(1) | 11 |
| § 502(6), 33 U.S.C. § 1362(6) | 4 |
| § 507(b), 33 U.S.C. § 1367(b) | 11 |
| § 507(e), 33 U.S.C. § 1367(e) | 11 |
| § 509(b)(1), 33 U.S.C. § 1369(b)(1) | 7 |
| § 509(b)(1)(d), 33 U.S.C. § 1369(b)(1)(d) | 8 |
| § 509(c), 33 U.S.C. § 1369(c) | 7, 11 |
| Judicial Code, 28 U.S.C. § 1 *et seq.*: | |
| 28 U.S.C. § 1254 | 2 |


## Regulations


| | |
|---|---|
| 40 C.F.R. Part 122 | 5 |
| 40 C.F.R. Part 125 | 5 |
| 40 C.F.R. § 125.36(n)(12) | 3 |


## Miscellaneous


| | |
|---|---|
| 39 Fed. Reg. 27078 (July 24, 1974) | 5 |

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SEACOAST ANTI-POLLUTION LEAGUE and
AUDUBON SOCIETY OF NEW HAMPSHIRE,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner, Public Service Company of New Hampshire, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on February 15, 1978.

### OPINIONS BELOW

In the separately bound appendix submitted herewith are set forth the opinion and judgment of the United States Court of Appeals for the First Circuit in *Seacoast Anti-Pollution League* v. *Costle*, No. 77-1284 (Feb. 15, 1978).

*App.* 1-19. The decision is not yet officially reported. It is unofficially reported in its uncorrected[1] version at 11 ERC 1358. The decision of the Administrator of the Environmental Protection Agency on review in the Court of Appeals (unofficially reported at 10 ERC 1257) (*App.* 20-66), the Technical Report referred to therein (*App.* 67-130) and the Administrator's denial of a stay of effectiveness of his decision (*App.* 131-143) are also set out in the separately bound appendix. None of these decisions is officially reported.

## JURISDICTION

The judgment of the Court of Appeals was entered on February 15, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED FOR REVIEW

1. May a court of appeals require that federal licensing hearings be conducted in accordance with adversarial procedures not required by the agency's generic statute because, in the court's judgment, such procedures will be "helpful . . . in guaranteeing both reasoned decision-making and meaningful judicial review"?

2. When an agency's generic statute requires only that there be an "opportunity for a public hearing", may a court of appeals nevertheless impose upon the agency's hearing process the requirements of Sections 5, 7 and 8 of the Administrative Procedure Act which by their terms apply only to adjudications "required by statute to be determined on the record"?

3. In disregarding an agency's explicit statement that a hearing record had not been improperly "supplemented" during the decision-making portion of an adjudicatory proceeding, did not the Court of Appeals depart so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

[1] By an order issued February 23, 1978, the Court of Appeals deleted a footnote (No. 24) which appeared in the opinion as first issued.



## STATUTES AND REGULATIONS INVOLVED

The case involves the sections of the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), the Administrative Procedure Act (APA) and U.S. Environmental Protection Agency Regulations listed below, which sections are reproduced in the separately bound appendix submitted herewith. *App.* 175-93.

1. FWPCA § 316, 33 U.S.C. § 1326. *App.* 184-85.
2. FWPCA § 402, 33 U.S.C. § 1342. *App.* 186-93.
3. APA § 4, 5 U.S.C. § 553. *App.* 175-76.
4. APA § 5, 5 U.S.C. § 554. *App.* 176-79.
5. APA § 7, 5 U.S.C. § 556. *App.* 179-81.
6. APA § 8, 5 U.S.C. § 557. *App.* 181-84.
7. 40 C.F.R. § 125.36(n)(12). *App.* 193.

## STATEMENT OF THE CASE

### Introduction

In June, 1977, the United States Environmental Protection Agency (EPA) issued a decision approving the cooling system of petitioner's nuclear power plant currently under construction in the State of New Hampshire. EPA's approval, granted after extensive hearings, represented the fourth separate administrative approval of the cooling system. Following earlier hearings, the system had also been approved by various agencies of the State of New Hampshire, a United States Nuclear Regulatory Commission

Licensing Board and the U.S. Army Corps of Engineers. By its decision in this case the Court of Appeals overturned EPA's decision and directed still further administrative proceedings with respect to petitioner's cooling system.

## I. The Statutory Framework

Under the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), 33 U.S.C. §§ 1251 *et seq.*, EPA issues regulations setting standards and guidelines which govern discharges into navigable waters of the United States. FWPCA further provides that, absent a permit issued by EPA, no one may discharge any "pollutant" (including heat)[2] into the navigable waters of the United States. § 402, 33 U.S.C. § 1342. Such permits may be issued only "after opportunity for public hearing." *Id.* FWPCA also provides that "after opportunity for public hearing," EPA may allow a variance or exemption which would permit the discharge of heat in excess of that allowed by the standards and guidelines contained in the regulations. § 316(a), 33 U.S.C. § 1326(a). Once issued, the permit transforms the regulations applicable to the particular discharge into obligations of the discharger. *EPA* v. *State Water Resources Control Board*, 426 U.S. 200, 205 (1976).

## II. Agency Proceedings With Respect to Petitioner's Nuclear Power Plant

The petitioner, Public Service Company of New Hampshire (PSCO), is the lead member of a consortium of pri-

[2] Pollutant is defined as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological material, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water." § 502(6), 33 U.S.C. § 1362(6).



vately and municipally owned electric utilities which own the Seabrook nuclear electric generating station. On August 1, 1974, pursuant to FWPCA §§ 316(a) & 402, 33 U.S.C. §§ 1326(a) & 1342, PSCO filed with Region I of EPA an application for the approval of the proposed Seabrook condenser cooling system. *App.* 21. In connection therewith, PSCO also sought a § 316(a) variance.

Fifteen months after the original application was filed, the EPA Regional Administrator for Region I, having held two legislative-type public hearings, approved the cooling system. This approval was consistent with the conclusions reached by various agencies of the State of New Hampshire, which had already concluded joint adjudicatory hearings lasting 32 trial days on the Seabrook plant.[3] Subsequently, on June 29, 1976, after some 60 trial days of hearings, an Atomic Safety and Licensing Board of the United States Nuclear Regulatory Commission (NRC) issued a lengthy decision reaching the same result. *Public Service Company of New Hampshire* (Seabrook Station, Units 1 & 2), LBP-76-26, 3 NRC 123 (1976), *aff'd*, ALAB-422, 6 NRC 33 (July 26, 1977), *aff'd*, CLI-78-1, 7 NRC __ (January 6, 1978).

After the Regional Administrator's approval the respondents Seacoast Anti-Pollution League (SAPL) and Audubon Society of New Hampshire (Audubon), obtained an adjudicatory hearing for further review by the Regional Administrator.[4] On November 9, 1976, the Regional Administrator reversed himself and revoked his prior approval.

[3] Dkt. No. D-SF 6205 Public Service Company of New Hampshire (N.H. Site Evaluation Committee and N.H. Public Utilities Commission).

[4] See 40 C.F.R. Parts 122 and 125, as then last amended, 39 Fed. Reg. 27078 (July 24, 1974).

PSCO's petition for review of the Regional Administrator's second decision was granted by the EPA Administrator. To assist him in his review of the record, which included 1620 pages of transcript and some 86 documentary exhibits including many highly technical studies, the Administrator convened a panel of six technical and scientific experts who were full-time members of the EPA technical staff with no previous connection with the Seabrook application. *App.* 24, 107-30. The Technical Panel was instructed to confine itself to sifting the record in the case and advising the EPA Administrator solely on the basis of that record. *App.* 78.[5] The EPA Administrator has expressly stated that the Technical Panel did not deviate from these instructions. *App.* 138.

The Technical Panel issued a report to the Administrator which concluded that the information in the record was sufficient to approve the proposed cooling system with a single exception. *App.* 67-105. That exception was a lack of certain technical information as to a certain mode of discharge which would occur at intervals during plant operation. *App.* 94. The EPA Administrator requested this information; PSCO furnished the information sought by submitting affidavits; and the EPA Administrator gave all parties an opportunity to comment thereon. The EPA Administrator denied SAPL and Audubon's request for a hearing (and cross-examination) with respect to this information because SAPL and Audubon failed to show any need therefor. *App.* 64-65.

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[5] The instruction to the Technical Panel stated:

> "You are asked to review the record and answer the following questions, based upon the record."

There then followed a list of questions. *App.* 78-79.



On June 17, 1977, the EPA Administrator issued a decision reversing the Regional Administrator and approving the Seabrook cooling system. *App.* 20-66. He also made public the report from the Technical Panel. *App.* 67-105. SAPL and Audubon then petitioned the Court of Appeals for review of the Administrator's decision pursuant to FWPCA § 509(b)(1), 33 U.S.C. § 1369(b)(1).

On February 15, 1978, three and one-half years after the initial application and one and one-half years after construction had commenced, the Court of Appeals vacated the EPA Administrator's decision and ordered further proceedings before that agency. This decision was predicated upon the Court of Appeals' belief that permit hearings before EPA must include at least all of the procedures set forth in sections 5, 7 and 8 of the Administrative Procedure Act (APA), 5 U.S.C. §§ 554, 556, 557, and a finding that two aspects of the EPA proceeding did not conform to this standard. In particular, the Court of Appeals found still further proceedings to be required in this case because of a perceived improper "supplementation" of the hearing record by the Technical Panel. *App.* 14-19.

## REASONS FOR GRANTING THE WRIT

### I. The Decision of the Court of Appeals Imposes upon Federal Agencies Procedural Obligations not Required by the Congress and is in Conflict with this Court's Decisions Regarding the Proper Scope of Judicial Review.

The linchpin of the Court of Appeals opinion was its decision to "judge the proceedings [at EPA] according to the standards set forth in §§ 554, 556, and 557 of the APA". *App.* 10. The Court of Appeals acknowledged that the generic statutes involved, FWPCA §§ 316 and 402, did not

*in haec verba* require permit hearings to be "on the record". *App.* 5. Nevertheless, because of "the nature of the decision at issue" and the court's view that "[a]dversarial hearings will be helpful . . . in guaranteeing both reasoned decision-making and meaningful judicial review", *App.* 6, the Court held that "[t]he panoply of procedural protections provided by the APA is necessary . . ." to protect the rights of both the applicant and "the public for whose benefit the very strict limitations have been enacted."[6] *App.* 7. Based upon this form of reasoning, the Court of Appeals announced that it was "willing to presume that, *unless a statute otherwise specifies,* an adjudicatory hearing subject to judicial review must be on the record." *App.* 8 (emphasis supplied).

This decision was thus directly contrary to the decisions of this Court, which for over thirty-five years has made

[6] The Court of Appeals did not view the requirement of meaningful judicial review as determinative of the question because it specifically rejected the view of the Ninth Circuit that FWPCA § 509(b)(1)(d), 33 U.S.C. § 1369(b)(1)(d), the provision for judicial review, itself made APA §§ 554, 556, 557 applicable. *Compare App.* 6 at n.6 *with Marathon Oil Company* v. *EPA,* 564 F.2d 1253 (9th Cir. 1977). The Court of Appeals also rejected the Seventh Circuit's view that the full APA adversarial adjudicatory proceedings could be required in EPA permit hearings on the basis of APA § 9(c), 5 U.S.C. § 558(c). *Compare* App. 10-11 at n.11 *with United States Steel Corp.* v. *Train,* 556 F.2d 822, 833-34 (7th Cir. 1977). It thus becomes apparent that the "nature of the decision at issue" and the Court of Appeals' assumption that the decision-making process will be facilitated by more procedure were the deciding factors. This ruling is directly contrary to the proper role of a court of appeals charged with reviewing federal agency decision making, a role that this Court has again had occasion to delineate in an opinion handed down after the Court of Appeals decision in this case. *See Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.,* — U.S. —, —, 46 U.S.L.W. 4301, 4308 (April 3, 1978).



clear in both adjudicative licensing, *e.g., FCC* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 143-44 (1940), and rule-making, contexts, *e.g., Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.,* __ U.S. __, 46 U.S.L.W. 4301, 4302 (April 3, 1978); *FCC* v. *Schreiber,* 381 U.S. 279, 290 (1965), that, absent an explicit statutory provision or constitutional restraint *to the contrary,* agencies are "free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *Vermont Yankee, supra* at 4307; *Schreiber, supra* at 290; *Pottsville Broadcasting, supra* at 143.

The Court of Appeals for the First Circuit has thus abrogated the EPA's freedom to determine the best method of discharging one of its "multitudinous duties" — in this case the complex task of assessing and deciding extremely technical and scientific issues committed to it by Congress. It has reversed the agency's expert decision-making for a perceived failure to utilize a full "panoply" of rigid procedures derived from the APA. Moreover, by advancing the proposition that unless Congress specifically provides otherwise courts should require that *all* agency adjudicatory hearings subject to their review must be conducted according to full APA trial-type procedures, the Court of Appeals has effected a wholesale reversal of the method of statutory interpretation consistently applied in this area for over a quarter of a century. *See Wong Yang Sung* v. *McGrath,* 339 U.S. 33 (1950).

## II. To the Extent It Construes the APA, the Decision Will Result in the Imposition of Formalistic Trial-Type Procedures on Numerous Administrative Proceedings Heretofore Unburdened by Such.

As noted in the previous section, the Court of Appeals appears to have held, incorrectly, that full APA procedures

should be judically imposed on EPA permit proceedings, even though the language of FWPCA does not require such an application. Even if the Court of Appeals' opinion might be read to rest upon a conclusion that the Congress, rather than the judiciary, has mandated such procedures, its error is equally clear.

Section 4 of the APA renders sections 7 and 8 applicable in rulemakings "required by statute to be made on the record after opportunity for an agency hearing . . . ." § 4(c), 5 U.S.C. § 553(c). This Court has held that absent the words "on the record" or their equivalent[7] in a generic stat-

[7] This Court analyzed the issue of equivalency in some detail in *United States* v. *Florida East Coast Ry.*, 410 U.S. 224 (1973):

> "Insofar as this conclusion is grounded on the belief that the language 'after hearing' of § 1(14)(a), without more, would trigger the applicability of §§ 556 and 557, it, too, is contrary to our decision in *Allegheny-Ludlum, supra.* The District Court observed that it was 'rather hard to believe that the last sentence of § 553(c) was directed only to the few legislative spots where the words "on the record" or their equivalent had found their way into the statute book.' 318 F. Supp., at 496. This is, however, the language which Congress used, and since there are statutes on the books that do use these very words, see, *e.g.*, the Fulbright Amendment to the Walsh-Healey Act, 41 U.S.C. § 43a, and 21 U.S.C. § 371(e)(3), the regulations provision of the Food and Drug Act, adherence to that language cannot be said to render the provision nugatory or ineffectual. We recognized in *Allegheny-Ludlum* that the actual words 'on the record' and 'after . . . hearing' used in § 553 were not words of art, and that other statutory language having the same meaning could trigger the provisions of §§ 556 and 557 in rule-making proceedings. But we adhere to our conclusion, expressed in that case, that phrase 'after hearing' in § 1(14)(a) of the Interstate Commerce Act does not have such an effect." 410 U.S. at 237-38.

The Court has thus recognized that congressional provision for a "hearing" before a federal agency in not the equivalent of a provision requiring the agency's decision "to be made on the record after opportunity for an agency hearing." In FWPCA §§ 316,



ute authorizing rulemaking, sections 7 and 8 of APA have no applicability. *United States* v. *Florida East Coast Ry.*, 410 U.S. 224, 237-38 (1973); *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 756-57 (1972).

The portion of the APA relied upon by the Court of Appeals in this case, section 5, is an exact counterpart of section 4 and makes sections 7 and 8 applicable to adjudications "required by statute to be determined on the record after opportunity for an agency hearing . . . ." 5 U.S.C. § 554(a).

Both sections of FWPCA at issue here, 316(a) and 402(a)(1), refer to decisions to be made by the EPA Administrator "after opportunity for public hearing," but neither section states that such hearings shall be "on the record." As such an omission cannot be deemed to be an oversight in drafting,[8] the Congress cannot be said to have directed that the full "panoply" of APA procedures be applied to every FWPCA section 316 or section 402 proceeding.[9]

402 the term "public hearing" is used. "Public" can add nothing to the word "hearing" in this context because it is clear that Congress is making no attempt to distinguish FWPCA permit hearings from "private" hearings. Thus, the word "public" cannot be construed as providing the equivalent of "on the record."

[8] Other sections of FWPCA do make reference to matters or hearings on the record. *E.g.*, §§ 507(b) & (e), 33 U.S.C. §§ 1367(b) & (e); § 509(c), 33 U.S.C. § 1369(c); § 307(a)(2), 33 U.S.C. § 1317(a)(2).

[9] In addition Congress is presumed to be familiar with judicial interpretations of terms having legal significance and to intend such terms to have the meaning given them by the judiciary when they are included in legislation. *Morissette* v. *United States*, 342 U.S. 246, 263 (1952). See also *United States* v. *Turley*, 352 U.S. 407, 411 (1957). By the time FWPCA was enacted, the presence — or absence — of the words "on the record" or their equivalent had become a fact of specialized significance connoting

The Court of Appeals nevertheless required such a "panoply" of additional procedures, construing section 5 of the APA to have a very different meaning from that of section 4 despite their virtually indistinguishable language and despite this Court's uncontradictable recognition that the two statutes are essentially identical. See *Camp* v. *Pitts*, 411 U.S. 138, 141 at n.3 (1973). The Court of Appeals decided that this identity of language was of no consequence because one section dealt with "adjudications" and one with "rulemaking". Congress, however, by using such identical language, demonstrated *its* intent that both "adjudications" and "rulemakings" be governed by the same standard.

The National Labor Relations Board advanced a directly analogous argument to this Court in *ITT* v. *Electrical Workers*, 419 U.S. 428 (1975), wherein it urged that the provision in 29 U.S.C. § 160(k), which requires the Board "to hear and determine" unfair labor practice disputes, did not bring such proceedings within 5 U.S.C. § 554, because the statute did not require such disputes "to be determined on the record after opportunity for an agency hearing." This Court found is unnecessary to reach that issue. *See* 419 U.S. at 442-43 n.15. If the decision of the Court of Appeals for the First Circuit in this case remains undisturbed, however, not only will the Labor Board's argument have been effectively rejected, but also the adversarial procedures of the APA will be necessitated whenever *any* federal agency conducts *any* proceeding which might fall within the broad definition of "adjudication." Such a far-ranging expansion of the understanding of congressional intent, if

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a definite intention. The decision of the Court of Appeals simply ignores the signalled legislative judgment, with which, as its decision makes clear, the Court of Appeals does not agree.



it is to be undertaken at all, should not be permitted without plenary consideration by this Court.

### III. By Disregarding the EPA Administrator's Statement as to the Actions Taken by His Technical Panel, the Court of Appeals Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of this Court's Power of Supervision

The result reached by the Court of Appeals, a remand for still further proceedings, depended[10] upon its finding that the Technical Panel had engaged in what was characterized as improper "supplementation". *App.* 19. This finding was directly contrary to the Administrator's express statement on the record that the Technical Panel had *not* supplemented the record, improperly or otherwise. *App.* 16 at n.20, 138.

The Court of Appeals stated that it was required to show no deference to the Administrator's representations in this regard. Instead, in the Court of Appeals' view, it was

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[10] The Court of Appeals also held the Administrator's decision to permit the filing of additional testimony in writing with an opportunity for written comment thereon violated the requirement of FWPCA §§ 316 and 402 that there be "an opportunity for a public hearing". *App.* 13. The court held that when a statute required a "public hearing" for initial licensing this overrides the express provision in section 7 of the APA that permits an agency to receive written testimony. *App.* 13. Having so held, the court then indicated that in the circumstances of this case it ordinarily would not require a remand on this question but for the fact that a remand was required in light of the perceived APA violation discussed in the text. *App.* 14-15.

authorized to conduct an independent review of this issue. *App.* 16 at n.20. The "independent review" which the Court actually undertook, however, consisted of only its *a priori* construction of certain statements made by the Technical Panel in its Report to the Administrator. The Court of Appeals construed several arguably ambiguous statements in this Report to be reflective of an improper "supplementation" by the panel.

The basis for the supplementation finding was the Court of Appeals' reading of four statements in the Technical Report. The court stated the most "serious" example of the Technical Panel supplementing the record occurred in the following statement excerpted from the Technical Report:

> "There is little information in the record on the thermal tolerances of marine organisms exposed to the specific temperature fluctuation associated with the Seabrook operation. However, the scientific literature does contain many references to the thermal sensitivity of members of the local biota." *App.* 17.[11]

The court went on to list three other statements which allegedly revealed improper "supplementation".

> "Similar, though less egregious, examples occur in the Report at pages 13-14 ('Thus, while it is true that the applicant did not perform exhaustive studies on all [Representative Important Species] it is not true that nothing is known about these species, their biology, distribution or value to the ecosystem.'); page 27 ('We concur . . . that there was no evidence on the question of whether there will be any impact on wildlife, such as birds . . . . Since we conclude that holoplankton . . . are not likely to be adversely affected, it is unlikely that there would be any conceivable impact at the top of the food chain.'); and page 30 ('We agree that only limited data exist on the migratory pathways of fish to and from Hampton Harbor . . . . Nevertheless there have been substantial studies performed on fish migratory behavior; some of these have been done at power plant sites.')" *App.* 17-18.[12]

[11] *Compare App.* 90 to see the statement in context.



The Court of Appeals did not hold that the type of literature referred to by the Technical Panel was improperly used, or that it was ineffective to fill any gaps in the record; the court held only that the method of bringing the material into the record — by a supposed "supplementation" — was improper. There was no such supplementation.

The Court of Appeals acted quite improperly in so construing arguably ambiguous statements to mean one thing, despite the explicit statement of the EPA Administrator (who had available to him the entire administrative record as well as the opportunity to consult with the members of the Technical Panel) that they meant something quite different. Such wholly unfounded judicial rejection of a conclusion reached by the head of a federal agency, which rejection is used as a basis for remanding to that agency a decision which was the result of years of previous proceedings and studies, is itself sufficiently erroneous to require relief from the Court of Appeals' interference with the administrative process. In this particular case, moreover, the magnitude of the Court of Appeals' error is revealed even more forcefully by events which have occurred since the date of its decision.

Since the decision of the Court of Appeals, EPA has commenced the process for reopening the hearing. As part of the agency's own presentation, the Technical Panel has filed for inclusion in the record a response to the Court of Appeals' decision. *App.* 159-73. In that response the Technical Panel makes clear that it did not supplement the record in any way, *App.* 161-62, and that literature which sup-

[12] *Compare App.* 86, 96, 98 to see these statements in context.

ported its reasoning, which the Court of Appeals believed was not cited in the record (*App.* 17 & n.21), was in fact cited in the record. *App.* 173. In short, the entire factual basis for the Court of Appeals' decision turned out to be erroneous. This was brought to the attention of the Court of Appeals in a motion for reconsideration. *App.* 144-73. The Court of Appeals permitted the late filing of the motion, entertained it, and summarily denied the relief sought. *App.* 174.

The situation presented is similar to that presented to this Court by Consumers Power Company in the case of *Vermont Yankee Nuclear Power Corporation* v. *Natural Resources Defense Council, Inc.*, — U.S. —, —, 46 U.S.L.W. 4301, 4310-11 (April 3, 1978), wherein this Court stated:

> "All this leads us to make one further observation of some relevance to this case. To say that the Court of Appeals' final reason for remanding is insubstantial at best is a gross understatement. Consumers Power first applied in 1969 for a construction permit — not even an operating license, just a construction permit. The proposed plant underwent an incredibly extensive review. The reports filed and reviewed literally fill books. The proceedings took years. The actual hearings themselves over two weeks. To then nullify that effort seven years later because one report refers to other problems, which problems admittedly have been discussed at length in other reports available to the public, borders on the Kafkaesque.
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> Administrative decisions should be set aside . . . only for substantial procedural or substantive reasons as mandated by statute, *Consolo* v. *Fed. Maritime Comm'n*, 383 U.S. 607, 620 (1966), not simply because the court is unhappy with the result reached."



There never existed a substantial procedural reason for sending this case back for still more hearings. The Court of Appeals' decision should be reversed.

## CONCLUSION

The effects of this decision will be felt far beyond the Seabrook site and the borders of New Hampshire. The decision will be precedent for holding that any time a generic statute requires an agency to grant "an opportunity for public hearing" the full panoply of APA procedures must be utilized. The petition for a writ of certiorari should be granted and the decision of the Court of Appeals reversed.

This Court's opinion in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, — U.S. —, 46 U.S.L.W. 4301 (April 3, 1978) was handed down after the Court of Appeals' decision in this case. While the unanimous decision in *Vermont Yankee* underscores the principles of administrative law which have been consistently adhered to by this Court and by the Congress for many years, it also provided the federal courts with an unequivocal restatement of their proper role in reviewing agency decision-making. The decision of the Court of Appeals for the First Circuit might well have been different had *Vermont Yankee* been available for its guidance at the time the opinion was written.[13] Therefore, while the errors of law committed by the Court of Appeals — in light of *Vermont Yankee* as well as previous precedents — war-

[13] While *Vermont Yankee* was cited to the Court of Appeals in the petitioner's out of time motion for reconsideration, *App.* 141, the Court of Appeals one-line denial, *App.* 174, gives no assurance that the Court of Appeals considered, or indeed thought itself empowered to consider, *Vermont Yankee*.

rant reversal of the decision below, it would be consistent with this Court's past practice to grant the petition for certiorari, vacate the judgment of the Court of Appeals, and remand the case to that court for reconsideration in light of *Vermont Yankee*.

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